No. 77-43

In the Supreme Court of the United States

OCTOBER TERM, 1977

RAY MELVIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1977. A petition for rehearing was denied on May 20, 1977. The petition for a writ of certiorari was not filed until July 7, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether extortion by a county sheriff of individuals who bootleg liquor produced out of state "affects commerce" within the meaning of the Hobbs Act, 18 U.S.C. 1951.

2. Whether petitioner's federal prosecution, which followed a mistrial in state court for the same acts, violated the Department of Justice's policy regarding dual prosecutions.

3. Whether the district court erred in refusing to permit petitioner's counsel, who had formerly represented a government witness, to cross-examine the witness concerning statements that the district court found to be protected by the attorney-client privilege.

4. Whether the district court abused its discretion in limiting the number of character witnesses petitioner could present and in preventing petitioner's counsel from examining a witness after petitioner had rested.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of seven counts of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951. He was fined $7,500 and sentenced to four years' imprisonment on each of four counts, the sentences to run concurrently; he was sentenced to five years' imprisonment and fined $10,000 on each of the remaining three counts, the fines and sentences to be suspended. He was also placed on probation for five years to begin upon his release from custody (Pet. App. 2a). The court of appeals affirmed (Pet. App. 1a-3a).

The evidence showed that petitioner, a former county sheriff, extorted money from bootleggers in exchange for not enforcing local liquor laws. Bootleggers who refused to pay were raided and closed by police (Pet. App. 1a-2a). Evidence was also introduced to prove that the bootleggers sold beer that had been packaged and brewed out of state (Tr. 29; see Pet. 7).

ARGUMENT

1. Petitioner contends (Pet. 7-13) that extortion of individuals who bootleg liquor produced out of state does not "affect commerce" within the meaning of the Hobbs Act (18 U.S.C. 1951), which in pertinent part provides sanctions against any person who "in any way or degree * * * affects commerce or the movement of any * * * commodity in commerce, by * * * extortion * * *." In enacting the Hobbs Act, Congress intended to utilize its constitutional power to regulate commerce to the fullest possible extent. *Stirone* v. *United States,* 361 U.S. 212, 215. The purpose of the Act parallels the central design of the Commerce Clause and, in so doing, proscribes extortion that "in any way or degree obstructs, delays or affects commerce." *United States* v. *Staszcuk,* 517 F. 2d 53, 58 (C.A. 7) (*en banc*), certiorari denied, 423 U.S. 837. The statute thus grants federal jurisdiction in all situations where commerce is affected, even where the effect may be minimal. *United States* v. *Amato,* 495 F. 2d 545 (C.A. 5); *United States* v. *Gill,* 490 F. 2d 233 (C.A. 7), certiorari denied, 417 U.S. 968; *United States* v. *Tropiano,* 418 F. 2d 1069 (C.A. 2), certiorari denied *sub nom. Grasso* v. *United States,* 397 U.S. 1021; *Carbo* v. *United States,* 314 F. 2d 718, 732 (C.A. 9), certiorari denied, 377 U.S. 953. See also *United States* v. *Spagnolo,* 546 F. 2d 1117 (C.A. 4), petitions for a writ of certiorari pending (see Nos. 76-6221 and 76-1194).

Under that standard, petitioner's conduct plainly affected commerce and thus came within the proscription of the Hobbs Act. As the district court noted (Tr. 757), the volume of beer produced out of state that was handled by the bootleggers had a value of "several thousand dollars a week. * * * [T]he fact that [the] imported beer

was handled by the bootleggers and the fact that the protection alleged to have been purchased from [petitioner] protected that activity and that it had a substantial dollar value is an affect on interstate commerce."

There is no support for petitioner's suggestion (Pet. 8-9) that the Hobbs Act does not apply because the individuals from whom petitioner extorted money were engaged in activity that was illegal.[1] The record in this case supports a finding that petitioner's extortion, and his consequent failure to enforce local liquor laws, affected each week the movement in "commerce"[2] of hundreds of cases of beer produced out of state.[3] That is sufficient to bring petitioner's activity within the Hobbs Act.[4]

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[1]The Court recently refused review in an analogous case, *United States* v. *Grigson*, C.A. 6, certiorari denied, May 23, 1977 (No. 76-1141), in which a local law enforcement officer was convicted under the Hobbs Act for extorting money from truck owners whose trucks were illegally overweight, in return for failing to enforce the weight limitations. As here, the fact that the truck owners were paying for the "protection" of activity that was illegal did not nullify the effect the extortion had on commerce or otherwise remove the extortion from the reach of the statute.

[2]"Commerce" as it is defined in the statute (18 U.S.C. 1951 (b)(3)) includes "all commerce between any point in a State * * * and any point outside thereof * * *." The evidence in this case showed that beer from out of state came into a "wet" county in Kentucky and from there was brought by the bootleggers into a "dry" county (see, *e.g.*, Tr. 36-37, 320).

[3]The district court correctly instructed the jury (Tr. 845-846):

> * * * I would tell you that if you believe from the evidence * * * that beer which was manufactured in a state other than * * * Kentucky came into Kentucky and in the normal course of commerce ended up in the hands of * * * alleged * * * bootleggers * * * and this business, whether legal or illegal * * *, was permitted to continue only upon the condition that * * * the bootleggers * * * pay to the [petitioner] * * * money, then you may find that there is a requisite affect on interstate commerce and there need not be any more.

[4]Petitioner does not raise, and there is accordingly no need for this Court to consider here, the issue whether an illegal activity must constitute "racketeering" to fall within the Hobbs Act. See

2. Petitioner's claim (Pet. 12) that the Department of Justice violated its policy against dual prosecution is incorrect. We believe petitioner would not be entitled to judicial relief on this ground even were there an accurate factual predicate for his claim, but here there is none. The Department informed petitioner's counsel by letter dated November 24, 1976, that petitioner's prosecution had been authorized by the proper officials within the Department in accordance with Department policy (see *Petite* v. *United States*, 361 U.S. 529).[5] (A copy of the letter to petitioner's counsel is set forth in an Appendix to this brief.)

3. Petitioner also claims (Pet. 14) that his attorney, Dan Jack Combs, was erroneously limited in cross-examination of a government witness on the ground that Combs had formerly represented the witness. The witness, Herbie Gene Wheeler, testified on direct examination that he had arranged a meeting between petitioner

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United States v. *Yokley*, 542 F. 2d 300 (C.A. 6); *United States* v. *Culbert*, 548 F. 2d 1355 (C.A. 9), petition for a writ of certiorari pending, No. 77-142. In the instant case, the county judge, trial commissioner jailer, and sheriff (petitioner) were all involved in a scheme to extort protection money from bootleggers over a period of six months (Tr. 58-80). Hence, however "racketeering" is defined, it would appear to include petitioner's activity. Significantly, the Sixth Circuit, which first held that the Hobbs Act only applied to "racketeering activity" (*United States* v. *Yokley*, *supra*), did not mention the issue in affirming petitioner's conviction here.

[5]In petitioner's case, several factors warranted federal prosecution. Petitioner's state trial had ended in a hung jury, and thus there was no danger of double punishment for the same offense. (Nor could double jeopardy even have barred a second trial by the State.) Both petitioner and his co-defendant were prominent local officials in a small county, which made local prosecution difficult. Finally, federal agents reported that there had been attempts to bribe government witnesses to prevent them from testifying.

and several bootleggers at Wheeler's garage, at which the extortion scheme was proposed (Tr. 54-58). Thereafter, Wheeler acted as middleman, collecting money from the bootleggers and delivering it to petitioner (Tr. 56).

During cross-examination of Wheeler, Combs attempted to question him concerning statements Wheeler had made to Combs in a conversation several months earlier (Tr. 201). At a side bar conference the prosecutor informed the court that Wheeler believed that the conversation was confidential and protected by the attorney-client privilege because at the time Combs had been his attorney (Tr. 201-202). The court then excused the jury and conducted a hearing to determine the validity of the claimed privilege (Tr. 202).

The facts adduced at the hearing showed that Wheeler, a bootlegger, and three other bootleggers had met with Combs in the Johnson County Law Library in July or August 1975 (Tr. 201). At the time, all of the bootleggers were under indictment in state court for bribery. (Petitioner, who also was represented by Combs, had also been indicted in state court on charges of extortion.) Apparently to insure the confidentiality of the conversation, Combs solicited one dollar from each of the bootleggers (Tr. 202, 210). Wheeler testified that Combs told him, "When we go to trial, I'll do everything I can for you just the same as I would [for] Sheriff Ray Melvin" (Tr. 205). Even though Wheeler was already represented by other counsel and knew that Combs represented petitioner (Tr. 209), Wheeler testified that, as a result of his conversation with Combs and the exchange of money, he believed Combs would represent him in court (Tr. 202, 209, 213). Wheeler said he discussed his case with Combs only because he thought Combs would be his lawyer and that the information would be confidential (Tr. 213).

Based upon the hearing, the district court held that the conversation was protected by the attorney-client privilege and limited cross-examination accordingly (Tr. 212).[6] Contrary to petitioner's contention (Pet. 16), the record as summarized above amply supports the district court's findings that Combs and Wheeler had an attorney-client relationship at the time of the conversation and thus that the conversation was inadmissible at trial.

There is also nothing to petitioner's claim (Pet. 17-18) that the limitation on cross-examination deprived him of a fair trial. While he does not phrase it as such, petitioner's claim in essence appears to be that Combs' prior relationship with Wheeler resulted in a conflict of interest that denied petitioner effective assistance of counsel. See *United States* v. *Jeffers*, 520 F. 2d 1256 (C.A. 7), certiorari denied, 423 U.S. 1066. But any other counsel who represented petitioner also would have been prohibited from cross-examining Wheeler concerning statements the witness had made to his attorney. Wheeler's refusal to waive the privilege simply resulted in Combs' being in no better position to cross-examine Wheeler than any other lawyer would have been (*United States* v. *Jeffers, supra*, 520 F. 2d at 1265; *United States* v. *Alberti*, 470 F. 2d 878, 881 (C.A. 2), certiorari denied, 411 U.S. 919).

Moreover, aside from the limitation on cross-examination, Combs' former representation of Wheeler did not hamper his representation of petitioner. Combs cross-

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[6]With Wheeler's knowledge, Combs had recorded their conversation at the law library (Tr. 207). The district court refused to admit the tape into evidence, but did ask that the tape be made a part of the record (Tr. 211). This never occurred. A transcript of the tape has been prepared in connection with disciplinary proceedings against Combs as a result of this incident; a copy of the transcript is being lodged with the Clerk of the Court.

examined Wheeler extensively (Tr. 214-226) and otherwise defended petitioner vigorously. The fact that an attorney may not pursue one line of questioning does not mean that petitioner was deprived of effective representation. See *United States* v. *Jeffers, supra,* 520 F. 2d at 1265.

In any event, there is no reasonable likelihood that Wheeler's impeachment could have affected the jury verdict.[7] Wheeler's testimony concerning the meeting with petitioner at Wheeler's garage was corroborated by several other witnesses who had attended the meeting (*e.g.,* Tr. 283-288, 297-302, 322-325, 338-339, 422-425). Two other witnesses also testified that they paid protection money to petitioner, and the government introduced tape recordings of the transaction to corroborate their testimony (Tr. 428, 431-434, 542-545, 559-563, 566-569, 572-575, 577, 592-595, 599-601, 604-606, 611). Thus, even if Wheeler had never testified, the evidence of petitioner's guilt would have been convincing.

4. Petitioner raises (Pet. 14) other alleged trial errors, none of which warrants further examination by this Court. He contends that the trial court arbitrarily limited the defense to three character witnesses and that defense counsel was prevented from cross-examining other witnesses about petitioner's character. Such determinations were, however, within the discretion of the trial judge

[7]It is unlikely that Wheeler could have been effectively impeached on the basis of the taped conversation. At the time of the conversation, Wheeler himself was under indictment in state court, and he denied all wrongdoing. But he subsequently was given immunity from prosecution and at trial admitted the apparent discrepancy in his testimony (Tr. 220, 223; see Tr. 246-247). Introducing the tape of his conversation would not have added significantly to the evidence regarding Wheeler's credibility that was already before the jury.

to make. See Rule 403, Fed. R. Evid.; *Hamling* v. *United States,* 418 U.S. 87, 127.[8] Petitioner also objects that he was not allowed to cross-examine a witness called by his co-defendant. This occurred when petitioner's counsel, who had already rested his case, attempted on cross-examination to go beyond the scope of direction examination and, in effect, make the witness his own. This the trial court properly refused to permit (Tr. 779-780).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
HENRY WALKER,
Attorneys.

SEPTEMBER 1977.

[8]After being instructed by the trial court that only three character witnesses could testify for each defendant (Tr. 12), petitioner's counsel nevertheless insisted on using the government's own witnesses to testify to petitioner's character. After much discussion (Tr. 21-24), the trial court permitted this line of questioning—even though the issue had not been raised by the government during direct examination—as if the witness had been called by petitioner (Tr. 317-318; see Rule 611(b), Fed. R. Evid.). After similarly questioning two other witnesses (Tr. 279-280, 292-294), petitioner's counsel was informed that he had used his allotted number of character witnesses (Tr. 304-309). Since the issue of petitioner's reputation was already before the jury, the trial court properly refused to admit cumulative testimony on that issue (see Rule 403, Fed. R. Evid.).

*The Solicitor General is disqualified in this case.

DOJ-1977-09

APPENDIX

November 24, 1976

T.11/4/76
RLT:THH:AJR:plh
186-30-1
Dan Jack Combs, Esq.
Dan Jack Combs, PSC
207 Caroline Avenue
Pikeville, Kentucky 41501

Re: *Ray Melvin, Johnson County Sheriff*

Dear Mr. Combs:

This is in response to your letter of September 15, 1976, wherein you inquired as to whether I or any other Assistant Attorney General approved the institution of a criminal proceeding against Ray Melvin in the Eastern District of Kentucky. As the United States Attorney for the Eastern District of Kentucky indicated to you in his letter of October 18, 1976, the initiation of this criminal prosecution conformed with the guidelines and policies of the Department of Justice.

While the Department of Justice has a policy against successivê state-Federal prosecutions in appropriate cases, the authority to prosecute Ray Melvin was granted in this case based upon its specific facts and circumstances.

Sincerely,

RICHARD L. THORNBURGH
Assistant Attorney General
Criminal Division

cc:Records
Section Chron
Reich (2)
Thornburgh